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No. 98-1993

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

— v. —

J.L.,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE FLORIDA SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, THE CRIMINAL JUSTICE POLICY FOUNDATION, THE JUVENILE LAW CENTER, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND THE SOUTHERN POVERTY LAW CENTER, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation composed of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members. The ACLU of Florida is one of its statewide affiliates. The Criminal Justice Policy Foundation, an educational, non-profit organization, established in 1989, promotes innovative solutions to criminal justice problems. The Juvenile Law Center is a national children's rights organization dedicated to advancing and protecting the rights of children in society, including in the juvenile and criminal justice systems. The National Legal Aid and Defender Association is an organization of several hundred public defender and legal services agencies. The Southern Poverty Law Center is a nonprofit organization supported by thousands of donors from across the country. *Amici* are dedicated to ensuring justice and due process for persons accused of crime, promoting the proper and fair administration of justice, and preserving the principles of liberty and equality embodied in the Bill of Rights.

STATEMENT OF THE CASE

During daylight hours in Miami, Florida, an anonymous person informed the police that several young black males were standing at a bus stop. The unknown tipster

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1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

described the young men and asserted that the one wearing a "plaid-looking" shirt was carrying a gun. Shortly after the tip was received, two officers arrived at the specified bus stop where they observed three black males. The officers did not see any of the three engage in suspicious behavior, and nothing else about the situation engendered any suspicion. One of the three young men, respondent J.L., was wearing a plaid shirt. One of the officers immediately approached J.L., ordered him to put his hands above his head, and frisked him. The officer found a gun in J.L.'s pocket. At the same time, the second officer frisked both of J.L.'s companions even though the tipster had not accused them of any wrongdoing.

The state filed a juvenile delinquency petition against J.L., charging him with unlawful carrying of a concealed firearm and unlawful possession of a firearm by a person under 18 years of age. After the trial judge granted J.L.'s motion to suppress the gun, the government appealed. The Florida Court of Appeal reversed the suppression order, concluding that the officer's conduct was based on a reasonable suspicion that J.L. was carrying a concealed weapon. *State v. J.L.*, 689 So.2d 1116 (Fla. Dist. Ct. App. 1997). J.L. appealed the decision to the Florida Supreme Court. The Court agreed with J.L.'s contention that his Fourth Amendment rights had been violated. A majority held that the facts known to the officers did not give rise to a "reasonable suspicion." *J.L. v. State*, 727 So.2d 204, 209 (Fla. 1998). Moreover, the majority refused to recognize a "firearm or weapons exception" to the reasonable suspicion requirement. *Id.*

The state of Florida petitioned this Court for a writ of *certiorari* to the Florida Supreme Court. On November 1, 1999, this Court granted the writ.

SUMMARY OF ARGUMENT

All considerations relevant to Fourth Amendment analysis dictate the conclusion that the stop and frisk in this case violated respondent's constitutional right to be secure against unreasonable searches and seizures. First, common law authorities provide no support for the contention that a stop and a frisk based on an unsubstantiated, anonymous tip are reasonable. History suggests that the Framers of the Constitution would not have approved of a practice that entails the same risks of arbitrariness that prompted them to outlaw general warrants. In addition, the message of the controlling precedents is unmistakable–stops and frisks based on unreliable, uncorroborated, anonymous tips are unreasonable. *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny demand an individualized, reasonable suspicion of criminal activity and danger. *Alabama v. White*, 496 U.S. 325 (1990), holds that when an anonymous tip is the basis for official action, the Constitution requires significant corroboration indicative of a reliable basis of knowledge and veracity. Because it included no such corroboration, the record here did not establish a reasonable suspicion.

A balancing of the severe intrusions occasioned by a stop and frisk against the limited extent to which official reliance on unsubstantiated, anonymous tips promotes the important government interest in detecting firearm possession also militates strongly against the reasonableness of the stop and frisk in this case. Stops and frisks are undeniably serious deprivations of sacred constitutional liberties. An unreliable, anonymous tip generates too small a likelihood that an individual is in possession of a weapon to counterbalance those deprivations. Stops and frisks on such insubstantial bases deprive innumerable innocent citizens of fundamental freedoms.

A "firearms exception" to the reasonable suspicion requirement is both legally and factually indefensible. First, the *abstract* interest in preventing dangerous firearm possession cannot offset the *concrete* intrusions caused by a stop and frisk. Second, and most important, enduring constitutional liberties may not be suspended or diluted on the basis of changes in crime rates or firearm use. Third, current rates of violent crime and firearm use belie claims of an escalating public safety crisis. Finally, a "firearms *exception*" to the "reasonable suspicion *exception*" to the textual probable cause norm is inconsistent with *Terry* and its progeny, and can only lead to the evisceration of a vital Fourth Amendment safeguard–the individualized suspicion demand.

Stops and frisks based on unreliable, uncorroborated, anonymous tips are also unreasonable because they threaten important Fourth Amendment principles. A central premise of Fourth Amendment jurisprudence is the necessity of neutral judicial review. If officers can justify their actions on so insubstantial a showing, this vital safeguard would be meaningless. In addition, several strands of Fourth Amendment doctrine evince a concern with preventing and discouraging official fabrication. A holding that officers may stop and frisk on tips such as the one in this case is an invitation to falsify. Finally, Fourth Amendment doctrine does and should provide some shelter against discriminatory law enforcement. The authority to act on unsubstantiated, anonymous tips creates excessive risks of unacceptable discrimination.

ARGUMENT

I. NEITHER HISTORY NOR THE CONTROLLING PRECEDENTS SUPPORT THE CONCLUSION THAT THE STOP AND FRISK OF J.L. WERE REASONABLE

A. The Common Law Provided No Authority to Stop And Frisk On The Basis Of An Unreliable, Uncorroborated, Anonymous Tip

In determining whether a governmental action violates the Fourth Amendment, the initial inquiry is whether that action "was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Wyoming v. Houghton*, 119 S.Ct. 1297, 1300 (1999). There is no evidence that the common law would have deemed a stop and frisk based on an unsubstantiated, anonymous tip to be reasonable.

"'No right [was] held more sacred, or [was] more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" *Terry v. Ohio*, 392 U.S. 1, 9 (1968)(*quoting Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). The authority to infringe upon this valued right by detaining a *suspicious* person can find some common law support. *Minnesota v. Dickerson*, 508 U.S. 366, 380-81 (1993)(Scalia, J., concurring). However, "there appears to be *no clear support at common law* for physically searching [a] suspect," on less than probable cause. *Id* at 381 (emphasis added); *see also* Sam B. Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 324 (1942)("At common law . . . a watchman . . . had no right to search before arrest."). Clearly, then, there

is no common law support for a stop and frisk based on nothing more substantial than an unreliable, anonymous tip that does not give rise to a reasonable suspicion. The "sacred" nature of the right to "possession and control of [one's] person" and the absence of "authority of law" for a stop and frisk such as the one at issue here suggest that the common law would have considered them unreasonable.[2]

B. According to the Court's Precedents, An Unreliable, Uncorroborated, Anonymous Tip Cannot Furnish The Individualized, Reasonable Suspicion Required For A Stop And Frisk

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court decided that while a stop is a seizure and a frisk is a search, *id.* at 16, both can be reasonable on less than probable cause. *Id.* at 20-21, 24-27. The Court, however, pointedly rejected the argument that mere "suspicion" could support a stop and frisk. *See id.* at 21-22. Instead, because a "demand for specificity . . . is the central teaching of . . . Fourth Amendment jurisprudence," *id.* at 21 n.18, an officer must "be able to point to specific and articulable facts which . . . reasonably warrant [the] intrusion[s]" effected by a stop and frisk. *Id.* at 21. The facts, "judged against an objective standard," must be sufficient to "'warrant a man of reasonable caution in the belief'" that a stop and frisk is warranted. *Id.* at 21-22. Official authority to search and seize based on "subjective good faith," "inchoate or unparticularized suspicion," or "inarticulate hunches" would result in the "evaporation" of Fourth Amendment rights and would leave us "'secure in [our] persons, houses, papers, and effects,' only in the discretion of the police." *Id* at 22. Consequently, a stop and a frisk are constitutional only when an officer has information that "leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." *Id.* at 30.[3]

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2. History provides additional reasons to condemn the stop and frisk in this case. Official abuses of the authority to search and seize were among the prominent causes of the American Revolution. *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 51-78 (1937). Colonists deeply resented the general warrants used to invade their homes and seize their persons because general warrants granted virtually unfettered discretion to conduct searches and seizures without adequate cause. *See* 3 Jonathan Elliott, *Debates on The Federal Constitution* 588 (2d ed. 1891) (reporting speech of Patrick Henry at the Virginia ratifying convention). The Warrant Clause of the Fourth Amendment was specifically designed to forbid general warrants, to restrict discretion, and to ensure that searches and seizures would be based "upon probable cause."

Stops and frisks based on unreliable, uncorroborated, anonymous tips are similar to general warrants, and are equally objectionable, because they involve excessive discretion to deprive citizens of precious freedoms without sufficient reason. Our ancestors' intense hostility to unjustified searches and seizures would almost certainly have led them to disapprove of a stop and a frisk like those at issue in this case. Moreover, neither history nor the terms of the Fourth Amendment furnish any reason to believe that the Framers would have accepted the claim that special dangers posed by firearms can justify searches and seizures without the ordinarily required showings of cause. *See infra,* Part II. C. The searches and seizures that our forebearers rebelled against were motivated by what the government believed were serious concerns. *See* Lasson, *supra* at 67-78 (discussing the significance of writs of assistance to the Crown as a tool for enforcing important revenue-generating tax laws).

3. The dissent in the Florida Supreme Court accused the majority of losing sight of "the fact that the rationale of *Terry* . . . is to protect" officers and the public. *J.L. v. State*, 727 So.2d 204, 211 (Fla. 1998)(Overton, J., dissenting). Unfortunately, like many of the opinions it cites in support of a "firearms exception" to *Terry*, the dissent lost sight of the critical fact that the dangers posed by weapons led the *Terry* Court to hold that a frisk is permissible *only* "[w]hen an officer is *justified in*

(continued...)

In subsequent cases, the Court has labeled the requisite showing a "reasonable suspicion." *See Brown v. Texas*, 443 U.S. 47, 51 (1979). A reasonable suspicion of criminal activity is required for a detention, *id.*, while a reasonable suspicion that a detained person is armed and dangerous is needed to sustain a frisk. *Maryland v. Buie*, 494 U.S. 325, 331-32 (1990). Consistently, the Court has mandated an individualized showing of articulable, objective facts that give rise to a sufficient likelihood that a particular stop and frisk will serve "society's legitimate interests" in crime prevention and community safety. *See Brown*, 443 U.S. at 51; *see also Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979).

Alabama v. White, 496 U.S. 325 (1990), makes it patently clear that the stop and the frisk in this case were not based on a reasonable suspicion that the respondent was involved in crime, was armed, or was dangerous. According to *White*, the value of an informant's report hinges upon two "highly relevant" factors–the informant's basis of knowledge and veracity. *Id.* at 328. Because a mere anonymous tip typically contains nothing to support either factor, alone it cannot justify a stop or frisk. *Id* at 329. To engender a reasonable suspicion, the tip must be corroborated.[4] Corroboration of "innocent" information can lead to reasonable suspicion, *but only if* it sufficiently supports the reliability of the tipster's source of information and the honesty of the

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3. (...continued)
believing that [an] individual . . . is armed and presently dangerous." *Terry*, 392 U.S. at 24 (emphasis added).

4. An inadequate tip could also be "supplemented" by additional information indicative of crime or danger. In such circumstances, the totality–the deficient tip "plus" the supplemental facts–could give rise to a reasonable suspicion. There was absolutely no "supplemental" information in the record in this case.

tipster. *Id.* at 332.

The minimum amount of corroboration necessary to satisfy the reasonable suspicion standard is illustrated by the Court's analysis in *White*–an anonymous tip case that was very "close" to the reasonable suspicion line. *Id.* at 332. In *White*, "independent corroboration . . . of *significant aspects* of the informer's *predictions* imparted some degree of reliability to the [critical] allegations" of the tipster. *Id.* at 332 (emphasis added). It was "important" that the facts that were corroborated included "a range of *details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted*." *Id.* at 332 (emphasis added). The unknown person's confirmed "ability to predict . . . future behavior" was "important" because it demonstrated inside information–that is, a reliable basis of knowledge. *Id.* at 332. Verification of "significant aspects of the [informant's] predictions" provided "reason to believe not only that the caller was honest but also that he was well [enough] informed . . . to justify the stop." *Id.* at 332.

White did not hold that the only way that the *inchoate* suspicion furnished by an anonymous tip can ripen into a *reasonable* suspicion is if predictions of future conduct are corroborated. It did hold, however, that if officers wish to rely on an accusation leveled by an anonymous source *alone*, they must have cognizable reasons to credit the reliability and honesty of the informant. *If* a tip contains "a range of details," *if* those details include "predictions of future behavior," and *if* those predictions are "corroborated," the informant's report of criminal activity will *just* clear the Fourth Amendment bar.

The tip in this case falls woefully short in every respect. It contained no detailed information, but merely

recounted the general facts that black males were standing at a bus stop and were wearing certain clothing and *concluded* that one of them had a gun. More important, the minimal information that was corroborated pertained to "condition[s] presumably existing at the time of the" tip. *Id.* at 332. "Anyone could have 'predicted'" those facts. *Id.* at 332. Confirmation of their accuracy provided precious little indication that the tipster had a reliable way of knowing about an illegal weapon or was telling the truth about the alleged weapon. If *White* was a close case, surely the facts of this case–a case devoid of all the "important" factors relied on in *White*–fall well short of establishing a reasonable suspicion.[5] Without "'[s]omething more,'"[6] a forcible stop and frisk were not justified.[7]

II. A BALANCING OF RELEVANT FOURTH AMENDMENT INTERESTS DICTATES THE CONCLUSION THAT THE STOP AND FRISK OF J.L. WERE UNREASONABLE

A. The Severe Intrusions Upon Liberty, Privacy, And Dignity Occasioned By Stops And Frisks Outweigh The Minimal Governmental Interests Advanced By Reliance on Unreliable, Uncorroborated, Anonymous Tips

The reasonableness of a search or seizure depends upon a balancing of the intrusion on the individual against the government interests served by the intrusion. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968); *see also Brown v. Texas*, 443 U.S. 47, 50 (1979) . The balance in this case dictates the same conclusion that the common law and controlling precedents mandate–that the stop and the frisk of J.L. were unreasonable.

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5. The Florida Supreme Court's reasoning is entirely consistent with this Court's conclusions in *United States v. Sokolow*, 490 U.S. 1 (1989), that a totality of nonsuspicious facts can give rise to a reasonable suspicion, *see id.* at 9-10, and that an officer with reasonable suspicion need not pursue a "less intrusive" alternative than a *Terry* detention. *See id.* at 10-11. The Florida Court's concern with the absence of suspicious indicia in this case reflected the view that "something more" was needed before *this undetailed and minimally corroborated tip* could support a reasonable suspicion finding. Moreover, its suggestion that the officer had to pursue a less intrusive alternative in this case was based on the correct conclusion that there was *no reasonable suspicion* for a stop and frisk of J.L.

6. *Adams v. Williams*, 407 U.S. 143 (1972), is distinguishable. In *Adams*, the "hearsay" supported a reasonable suspicion because the informant was *present* at the scene of the stop and frisk and was *known* to the officer. The Court indicated that information from absent, anonymous tipsters would carry less weight. *Id.* at 146. The *Alabama v. White* majority observed that the requirement of "'[s]omething more'" for anonymous tips was consistent with the conclusion in *Adams* that some tips are so unreliable that they would warrant either "'no police response or require further investigation.'" *White*, 496 U.S. at 329 (quoting *Adams v Williams*, 407 U.S. at 147).

7. A pair of alternative scenarios reinforce this conclusion. If the officer who stopped and frisked J.L. had done so based on her own conclusion that he was in possession of a firearm or based on a fellow officer's assertion identical to that provided by the anonymous tipster, her actions would undoubtedly have been unreasonable. Like showings of probable cause, showings of reasonable suspicion must be based on objective, articulable *facts*. Judges may not defer to the barebones *conclusions* of officers, but instead must independently determine whether the articulated facts support a reasonable suspicion. *See Sokolow*, 490 U.S. at 10; *Illinois v. Gates*, 462 U.S. 213, 239 (1983). The tip in this case can support a reasonable suspicion finding *only if* an unknown tipster's assertions are considered more reliable and credible than equivalent assertions by a known police officer. Such a premise would be worse than "quixotic," *Gates*, 462 U.S. at 272 (White, J., concurring); it would be factually erroneous and legally misguided.

Terry recognized that stops and frisks intrude severely upon individuals' interests in personal liberty, privacy, and dignity. The *Terry* Court did not dwell upon the intrusiveness of detentions, but did "emphatically reject th[e] notion" that they were not Fourth Amendment "seizures." When an officer "accosts an individual and restrains his freedom to walk away, he has 'seized' that person," *Terry*, 392 U.S. at 16, and only a "reasonable suspicion" of criminal activity can counterbalance the serious loss of liberty. *Id.* at 30.

The Court left no doubt about the severity of the intrusion entailed in a frisk. According to Chief Justice Warren, the suggestion that a public patdown is "a 'petty indignity'" is "simply fantastic." Instead, "[i]t is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Id.* at 16-17. It "constitutes a *severe . . . intrusion upon cherished personal security*, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25 (emphasis added).[8] Frisks are no less intrusive or offensive today than they were in 1968.

The magnitude of the countervailing government interest depends upon both the nature of that interest and a showing that the interest is present in a particular situation. *See Brown*, 443 U.S. at 50-51. The interests in securing an illegal firearm and in protecting officers and others from an armed, dangerous person are powerful and legitimate in nature. The gravity of those public interests explains the *Terry* Court's willingness to create a narrow exception to the textual probable cause requirement for protective frisks. Clearly, then, the interests claimed to be served by the stop and frisk in this case *could* outweigh the intrusion upon respondent's Fourth Amendment interests.

The problem, however, is that there was no showing that the officer's action would advance these important public interests to a sufficient degree. The unsubstantiated, anonymous tip did not establish a sufficient *likelihood* that a stop and frisk would promote public safety. A barebones tip with minimal corroboration falls well short of establishing a reasonable suspicion because it does not give rise to a constitutionally adequate *probability* that a search and seizure will promote the government's interests. The interests in this case–and others like it–are insufficiently weighty to outweigh the severe intrusions on personal freedom, privacy, and dignity

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8. The Court's detailed depiction of frisks, *see Terry*, 392 U.S. at 17 n.13, graphically reinforced the conclusion that frisks severely intrude upon constitutional interests that have traditionally been considered sacred and inviolable absent concrete, individualized showings of countervailing interests. Subsequent decisions only confirm that conclusion. A frisk is never permissible on less than a "reasonable suspicion" that a particular suspect is "armed and dangerous." *Maryland v. Buie*, 494 U.S. 325, 331-32 (1990). Because the invasion is so severe, the Court has jealously confined the power to frisk to situations involving weapons. Officers must demonstrate *probable cause* before the strong societal interests in detecting contraband or evidence of violent crimes can outweigh such an intrusion. *See Minnesota v. Dickerson*, 508 U.S. 366, 376 (1993); *see also Ybarra v. Illinois*, 444 U.S. 85, 94-96 (1979).

In *Dickerson*, the Court concluded that the privacy loss occasioned
(continued...)

8. (...continued)
by even a simple, manual manipulation of an object in a pocket requires probable cause to believe that the object is contraband. 508 U.S. at 378-79. And in *California v. Hodari D.*, 499 U.S. 621, 624-25 (1991), the Court held that "the slightest application of physical force"–even "'merely touching, however slightly, the body of the'" suspect–is sufficient to effect a seizure. In the Court's view, physical intrusions upon the sanctity of persons clearly constitute serious infringements upon important constitutional liberties.

not because illegal firearm possession is a minor concern, but, rather, because there was inadequate reason to believe that that interest would be advanced.

B. Stops and Frisks Based On Unreliable, Uncorroborated, Anonymous Tips Deprive Innumerable Innocent Citizens of Fundamental Constitutional Liberties

A primary reason that the Fourth Amendment prohibits stops and frisks based on hunches and unfounded suspicions and demands individualized, "reasonable suspicion" is to protect innocent citizens against the loss of invaluable liberties. *See Reid v. Georgia*, 448 U.S. 438, 441 (1980); *United States v. Sokolow*, 490 U.S. 1, 11 (1989)(Marshall, J., dissenting). Stops and frisks based on less than reasonable suspicion are not unreasonable because they would *never* be productive. Even when the government's showing falls short of the minimum level of probability demanded by the Constitution, some stops and frisks will in fact detect criminal activity. The problem, however, is the high price of this modest productivity. For every stop and frisk that bears fruit, innumerable innocents will have to suffer losses of liberty, privacy, and dignity.[9]

Unreliable, anonymous tips pose particularly serious threats to the rights of innocents. By definition, an anonymous source's character and motivation are unknown. He may be an inveterate liar, mentally unstable, irrational, fearful, or prone to leap to conclusions based on insubstantial information. She

9. Even completely random searches and seizures–warrantless, causeless sweeps through all homes in a neighborhood, for example–will sometimes produce tangible results. They are forbidden in our free society, however, because the costs dramatically outweigh the benefits.

may be prompted by a grudge, engaged in a prank, or biased by racism. *See Alabama v. White*, 496 U.S. 325, 333 (1990)(Stevens, J., dissenting). Without affirmative reasons to believe that an informant is honest and has a good source of information, the chances that the person targeted by an accusation will be blameless are intolerably high. Corroboration of minimal details that "anyone could know" does nothing to diminish the risks. If officers are permitted to act on unreliable, uncorroborated, anonymous tips, mistaken intrusions upon innocent citizens will abound.[10]

"[A] very large category of presumably innocent [citizens] . . . would be subject to virtually random [searches and] seizures were the Court to conclude that as little foundation as there was in this case could justify a [search and] seizure." *Reid*, 448 U.S. at 441; *see also Maryland v. Wilson*, 519 U.S. 408, 415-22 (1997)(Stevens, J. dissenting). That is reason enough to conclude that the balance of interests tips decisively against the reasonableness of a stop and frisk in these circumstances.

C. Fourth Amendment Interest Balancing Does Not Support A "Firearms Exception" To The

10. Like probable cause, reasonable suspicion is a "common sense" concept. *See Sokolow*, 490 U.S. at 7-8. Any suggestion that anonymous informants are somehow inherently worthy of belief runs contrary to common sense. Surely, no *rational* investor would make important financial decisions wholly on the basis of "tips" comparable to the one in this case. The reason an investor would demand additional support is simple. The gains made from an occasional profitable investment would be dramatically offset by the losses incurred from misguided ventures. Investment in reliance on the tips would make sense only if there were good enough reasons to credit the tips. It is equally irrational to allow officers to base important constitutional decisions upon such tips unless there are good reasons to credit the tips.

Reasonable Suspicion Requirement

Courts that have upheld stops and frisks based on tips that are inadequate to establish a reasonable suspicion have effectively created a "firearms exception" to *Terry's* "reasonable suspicion exception" to the probable cause demand.[11] Interest balancing does not support that exception. Moreover, a firearms exception cannot be reconciled with the precedents and would threaten to eviscerate the vital demand for individualized, objective showings of reasonable suspicion.

The "firearms exception" to the reasonable suspicion requirement rests on the notion that the character of the societal interest in preventing illegal firearm possession is so critical it justifies intrusions on less than the normally required showing.[12] The "gravity" of the public concern with dangerous, illegal weapons is undeniable. The *abstract* importance of that interest alone, however, cannot counterbalance the *concrete* intrusions involved in stops and frisks. The Fourth Amendment scales tip only when the government's interest is also made concrete–*i.e.*, given cognizable weight–by a demonstration of individualized suspicion. No matter how significant the interest to be served, the constitutional balance favors individuals until the public's interest is shown to be real.

Some opinions suggest that an exception to the norm of sufficient individualized suspicion is justifiable because an escalating epidemic of illegal firearm possession and violence has resulted in a public safety crisis.[13] There are persuasive answers to this superficially attractive proposition.

First, and most important, the enduring protections of the Constitution may not be suspended simply because a particular type of crime or danger may have increased. The values embodied in the Fourth Amendment--privacy, liberty, and dignity–are immutable. The special character of these "bulwark[s] of our national liberty," *see United States v. Havens*, 446 U.S. 620, 634 (1980)(Brennan, J., dissenting), makes them immune to changes in the prevailing winds.

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won . . . a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less,

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11. Typically, the opinions do not use the "firearms exception" label. It is evident, however, from their reasoning, that they are willing to suspend the normal requirement of reasonable suspicion solely because the subject of a tip is a firearm. The result is a *de facto* "firearms exception" to the reasonable suspicion norm. *See, e.g., United States v. DeBerry*, 76 F.3d 884, 886 (7th Cir. 1996); *United States v. Bold*, 19 F.3d 99, 104 (2d Cir. 1994); *United States v. Clipper*, 973 F.2d 944, 951 (D.C. Cir. 1992).

12. *See DeBerry*, 76 F.3d at 886 ("Armed persons are so dangerous to the peace of the community that the police should not be forbidden to follow up a tip that a person is armed, and as a realistic matter this will require a stop *in all cases*." (emphasis added)); *State v. Sharpless*, 715 A.2d 333, 338 (N.J. Super. Ct. App. Div. 1998)("[B]ecause of the imminent danger posed by firearms, an anonymous tip that a person is armed should be treated differently than a tip concerning other . . . criminal activity.")

13. *See, e.g., Bold*, 19 F.3d at 104; *Clipper*, 973 F.2d at 951; *State v. Hasenbank*, 425 A.2d 1330, 1334 (Me. 1981).

important.

Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). To deny our most prized freedoms in times of crisis is to deny the very essence of our national character. The temptation to do so is understandable and powerful, but surrender to that temptation can only bring regret.[14] Consequently, a firearms exception to the reasonable suspicion requirement is legally indefensible.[15]

Even if a "firearms exception" could be reconciled with

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14. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); 50 U.S.C. App. §§ 1989, 1989a (1988)(congressional acknowledgment of and apology for fundamental injustice of internment of those with Japanese ancestry).

The responsibility for responding to public safety crises rests primarily in the hands of the political branches who have a variety of means to deal with the excess availability of firearms within the constraints imposed by the Constitution. Those who call for a "firearms exception" to the Fourth Amendment norm are essentially asking the courts to suspend fundamental liberties because they are unsatisfied with the measures taken and results achieved by the responsible branches. The courts should decline the request.

15. A recurrent refrain in opinions endorsing a "firearms exception" is that officers must have the authority to stop and frisk those who are the subjects of tips concerning firearms because failures to act could have dire consequences. *See, e.g., United States v. Gibson*, 64 F.3d 617, 624 (11th Cir. 1995); *State v. Pully*, 863 S.W.2d 29, 33-34 (Tenn. 1993). While this concern with the dangers posed by alternative courses of action is understandable, it reflects either a lack of appreciation for or a disagreement with the balance struck by the Fourth Amendment. "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987). The Framers of the Fourth Amendment understood that the price of freedom can be quite high, but made the decision to pay that price.

the Constitution, it could only be justified by a proven, compelling need for judicial intervention. The burden of proof falls on supporters of the exception. They have not carried their burden, nor could they do so, for the empirical evidence is to the contrary. All the statistical data compiled in recent years contradicts the claim that a spiraling epidemic of firearm violence threatens the stability of our nation and the well-being of our people. Rather than showing a burgeoning crisis, the studies published over the past several years document a consistent and dramatic downward trend in crime, violent crime, homicides, and firearm use.[16] Juvenile crime and violence rates have dropped even more steeply than the general crime rates.[17] The numbers show anything but an escalating

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16. Violent crime has decreased 20.6% since 1994. *See* Federal Bureau of Investigation, Dep't of Justice, *Uniform Crime Reports for the United States–1998*, at 12 (1999). The national murder rate dropped 30% during that period, *id.* at 15, reaching the lowest level–6 per 100,000–since 1967. *Id.* at 14; *see* Bureau of Justice Statistics, Dep't of Justice, *Homicide Trends in the United States* 1 (1999)(stating that murder rate has fallen to lowest level in three decades). Nonfatal firearm injuries have also decreased, falling 40.8% between 1993 and 1997. *See* Centers for Disease Control, *MMWR Weekly Report, Nonfatal and Fatal Firearm Related Injuries–United States*, 1993-1997, at 1 (Nov. 19, 1999).

17. The dissent in the instant case, by relying on FBI statistics for 1970-1992 and ignoring the post-1993 data, is able to paint a dramatic, but grossly misleading, picture of a nation in which "[v]iolent crime committed by juveniles continues to rise." *See J.L.v. State*, 727 So.2d 204, 211 n.8 (Fla. 1998) (Overton, J., dissenting). In reality, juvenile violence has declined nationally by 33% since 1993. *See* Office of Juvenile Justice and Delinquency Prevention, Dep't of Justice, *Juvenile Offenders and Victims: 1999 National Report* 57 (1999). Homicides involving juveniles dropped 39% during that time period. *Id.* at 55. Overall, the serious violent crime rate for juveniles has dipped below the 1973 level. *Id.* at 62. Perceptions of juvenile crime and violence have been distorted by a limited number of highly visible incidents. *Id.* at 51. The search for a proper constitutional

(continued...)

explosion of firearm violence. Consequently, a firearms exception to *Terry* is also factually unjustified.

A "firearms exception" is also inconsistent with the Court's precedents–most tellingly with *Terry* itself. With full awareness of the perils of concealed firearms and the dangers they pose to public safety, the *Terry* Court nonetheless demanded individualized reasonable suspicion for a stop and frisk and strenuously resisted the claim that less could suffice. The suspected armed robbery in *Terry* posed a danger at least as serious as possession of a concealed weapon, yet the Court refused to permit a stop and frisk absent an objective, individualized showing that danger was likely. Aware of the harms threatened by an armed robber (*i.e.*, a robber with a concealed weapon), the Court nonetheless adhered to the Fourth Amendment demand for specific and articulable facts that justify the particular intrusion. The *Terry* Court acknowledged our tradition of armed and violent criminals, *Terry*, 392 U.S. at 23-24, but rejected the proposition that the dangers posed by that tradition could justify random, arbitrary seizures and searches.[18]

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17. (...continued)
balance is not advanced by reliance on those emotionally-charged, unrepresentative tragedies. *See J.L.*, 727 So.2d at 211 n.9 (Overton, J., dissenting)(stringing together the sites of recent school shootings).

18. The Court's awareness of the harm threatened by the prevalence of violence and firearms in our nation is evident in its reliance on the FBI's Uniform Crime Reports for 1966 and its acknowledgment that the "easy availability of firearms to potential criminals in this country is well known and has provoked much debate." *Terry*, 392 U.S. at 24 n.21. The assertion that we now face levels of crime, violence, and firearm use that were unforeseen by, or unforeseeable to, the *Terry* Court is belied by the fact that today's levels are comparable to those in 1967. *See supra* notes 16, 17; *see also* 35 Weekly Comp. Pres. Doc. 2071 (Oct. 17, 1999)(murder
(continued...)

Subsequent decisions have not departed in the slightest from the course mapped out by *Terry*. The Court has not recognized a single exception to the "reasonable suspicion" norm for on-the-street stops and frisks.[19] The result is simple, clear guidance for officers and courts: All stops and frisks require an articulable, reasonable suspicion. Nothing less will do. Nothing less should do.[20]

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18. (...continued)
rate is at its lowest since 1967).

19. Neither the compelling interest in detecting contraband traffickers, *see Sokolow*, 490 U.S. 1 (1989), nor the vital interest in apprehending a violent armed robber, *see United States v. Hensley*, 469 U.S. 221 (1985), has prompted the Court to suspend the reasonable suspicion demand.

20. The rare, exceptional situations in which searches or seizures are reasonable in the absence of particularized, reasonable suspicion are clearly distinguishable from the situation involved here. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), held that seizures at sobriety checkpoints can be reasonable in the absence of individualized suspicion. The compelling, regulatory interest in preventing drunk driving tipped the Fourth Amendment balance in that case *only* because the intrusions upon individuals' liberty and privacy interests were "slight" and "minimal." *Id.* at 451-52. The checkpoint sites were selected according to neutral, objective guidelines, the officers made nondiscretionary stops of all who passed the checkpoint, and the duration of the stops was exceedingly short. None of the factors critical to the outcome in *Sitz* obtain when an officer makes a discretionary decision to stop and frisk an individual suspect based on an anonymous tip.

In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), important "special needs beyond the normal need for law enforcement," were sufficient to tip the Fourth Amendment balance in favor of suspicionless, random drug testing. *See Skinner*, 489 U.S. at 619-20, 633-34. In none of the cases could the evidence found be used in a criminal
(continued...)

Finally, there is no inherent reason to treat firearms differently from any other important public safety interest. Recognition of a "firearms exception" to the reasonable suspicion requirement would constitute a perilous step onto a slippery constitutional slope. A "firearms exception" would lead unavoidably to intolerable erosion of a vital constitutional safeguard against "arbitrary and abusive police practices." *See Brown*, 443 U.S. at 52.

III. THE AUTHORITY TO STOP AND FRISK ON THE BASIS OF UNRELIABLE, UNCORROBORATED, ANONYMOUS TIPS PRECLUDES JUDICIAL SCRUTINY, INVITES OFFICIAL FABRICATION, AND PROMOTES DISCRIMINATORY LAW ENFORCEMENT

There are additional, compelling reasons to reject the contention that stops and frisks based on unreliable, uncorroborated, anonymous tips are consistent with the Constitution. The Fourth Amendment's insistence on judicial review, its concern with official fabrication, and its hostility toward discriminatory law enforcement all support the conclusion that such stops and frisks are unreasonable.

A. Permitting Stops And Frisks Based On

20. (...continued)
prosecution. Moreover, in all three cases the intrusions on the tested individuals were "limited." All of the individuals subject to testing had "diminished expectations of privacy" and all of the testing schemes restricted the intrusiveness of the privacy invasions. Stops and frisks of citizens based on anonymous tips do not serve "special needs" beyond law enforcement. The evidence discovered can be and is used in criminal prosecutions. Perhaps most important, the intrusions are not limited by factors that diminish the victims' expectations of privacy or limit the invasiveness of the searches or seizures.

Unreliable, Uncorroborated, Anonymous Tips Effectively Precludes Meaningful Judicial Review

Judicial review of officers' decisions to search and seize is a fundamental premise of Fourth Amendment jurisprudence. "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

The warrant rule requires scrutiny before a search occurs. *See Katz v. United States*, 389 U.S. 347, 357 (1967). When warrants are not required, judicial review takes the form of after-the-fact scrutiny of the factual predicate for official action. Thus, a "court sitting to determine the existence of reasonable suspicion must require the [officer] to articulate the factors leading to that conclusion," and must make an independent review of the totality. *United States v. Sokolow*, 490 U.S. 1, 10 (1989). Officers' awareness that judges will conduct such reviews and will not simply defer to their judgments curbs abuse and discourages mistakes. Moreover, neutral review of the justifications for searches and seizures permits the correction of errors and promotes the vindication of constitutional rights.

If an officer's "subjective good faith alone," "inchoate suspicion," or "inarticulate hunch" were sufficient to support intrusions, "'the people would be "secure in their persons, houses, papers and effects," *only in the discretion of the police*.'" *Terry*, 392 U.S. at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)) (emphasis added). It would be virtually impossible for judges to conduct meaningful, independent

review of such amorphous, nonobjective predicates. Without the prospect of independent review, overzealous law enforcement would go unchecked, official mistakes would go undeterred, and violations of constitutional interests would go unsanctioned. As the *Terry* Court realized, enforcement of a substantive, objective reasonable suspicion requirement is essential to preserve the reality of judicial scrutiny.

Officers' decisions would effectively be immunized from judicial scrutiny if an unknown tipster's bare assertion that a black man wearing a certain shirt in a particular place has a weapon were enough to justify a stop and frisk. There would be next to nothing for judges to evaluate and no reason for officers to fear that their decisions to intrude will be overturned. The result would be "arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown v. Texas*, 443 U.S. 47, 51 (1979).[21]

B. Permitting Stops And Frisks Based On Unreliable, Uncorroborated, Anonymous Tips Invites Official Fabrication

The Fourth Amendment's concern with falsehood and fabrication by law enforcement officers is evident in both the constitutional text and the Court's opinions. The textual demand that warrant applications be "supported by Oath or affirmation" discourages misrepresentation by raising the specter of punishment for perjury. By requiring officers to secure warrants, the warrant rule both gives force to the "Oath or affirmation" demand and precludes hindsight-based fabrication of justifications for searches. *See Katz*, 389 U.S. at

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21. Because many of the victims of the unreviewable, yet unjustified, invasions would be "innocent" citizens, there is particular reason for concern.

358. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Court evinced a belief that Fourth Amendment doctrine should be designed to prevent and correct official misrepresentations by holding that warrants are invalid if based on intentional or reckless falsehoods.

Nothing in the Constitution or the Court's opinions can eliminate all official fabrication. No matter what rules, penalties, or remedies are constructed to discourage the odious practice of lying by the police, understandable temptations to falsify will lead some officers to do so. Nonetheless, the standards that give content to Fourth Amendment liberties can and should be designed to minimize risks and diminish temptations. The law should not "invite" official fabrication.[22]

The less an officer has to assert to support her actions, the lower the risk of being caught in a lie. If vague, undetailed assertions with minimal, irrefutable corroboration are sufficient, there is almost no chance of later contradiction. Moreover, if the critical accusations can come from the mouth of an unidentified and unidentifiable source, the likelihood that an officer will be held responsible for disproven assertions is diminished even further. Thus, if an officer need only state that an anonymous tipster claimed that a young black man wearing a plaid shirt was standing at a bus stop and had an illegal weapon, the risk of untruths coming to light is minuscule.[23] A holding that such barebones tips are enough is

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22. Even if most officers are honest and would resist the temptation to falsify, Fourth Amendment law must provide safeguards against "the overzealous and unscrupulous officer." *See Alabama v. White*, 496 U.S. 325, 333 (1990)(Stevens, J., dissenting).

23. The risk could be cognizable if officers had to make their showings before stopping and frisking a suspect. Because all showings in

(continued...)

an invitation to operate on the basis of a hunch, a feeling, or an unreasonable suspicion. In cases where something is found, officers can easily tell a "harmless" lie about the existence of an unnamed informant.[24] "[E]very citizen [would be] subject to being seized and [frisked] by any officer who is prepared to testify that the warrantless stop [and frisk were] based on an anonymous tip" describing the clothing and location of the suspect and asserting that he had a weapon. *See White*, 496 U.S. at 333 (Stevens, J., dissenting).

To minimize the temptation to fabricate and the motivation to stop and frisk on inadequate grounds, the Court should adhere to the *Alabama v. White* demand for "something more" whenever anonymous tips are involved.[25] Fidelity to the Fourth Amendment's concern with falsification requires as much.

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23. (...continued)
support of *Terry* detentions are made after the fact, the risk that the facts discovered will be inconsistent with those sworn to in advance is nonexistent.

24. Some who are intimately involved in the criminal justice system believe that officers frequently tell "small lies" in order to justify unlawful searches and seizures. *See* Ted Rohrlich, *Scandal Shows Why Innocent Plead Guilty*, L.A. Times, Dec. 31, 1999, at A1 (former Kansas City chief of police "believes hundreds of thousands of police officers tell those kinds of lies in court every year" and current Ninth Circuit judge "has called this kind of police perjury widespread").

25. Searches and seizures based on official misrepresentations will often intrude on those engaged in no wrongdoing. Consequently, the constitutional concern with fabrication is once again explicable, in part, by the desire to protect "innocents" against deprivations of fundamental freedoms. In the instant case, two innocent young men were frisked apparently because of their association with the subject of an unsubstantiated, anonymous tip.

C. Permitting Stops And Frisks Based On Unreliable, Uncorroborated, Anonymous Tips Generates Unacceptable Risks Of Discriminatory Law Enforcement

If a search or seizure is supported by objective facts known to an officer, the officer's subjective, discriminatory motivations do not render her conduct unreasonable under the Fourth Amendment. *See Whren v. United States*, 517 U.S. 806 (1996). This does not mean, however, that the risks and consequences of discriminatory law enforcement are necessarily irrelevant to Fourth Amendment analysis. The precedents suggest, and properly so, that a concern with preventing discriminatory deprivations of constitutionally guaranteed privacy and liberty should factor into Fourth Amendment analyses.

The *Terry* Court was aware of and sensitive to the "harassment" and "humiliation" of certain groups, particularly the young and minorities, by some police officers. *See Terry*, 392 U.S. at 14, n.11. The refusal to permit stops and frisks based on hunches or unparticularized suspicions and the insistence on objective, reasonable suspicion were rooted in a recognition of the dangers of arbitrariness and abuse inherent in excess official discretion. One of those dangers is invidious discrimination. By rejecting the arguments in favor of unrestricted discretion to stop and frisk, the Court barred officers from relying on race, age, gender, or other irrelevant grounds to justify stops and frisks and provided at least some protection against destructive, discriminatory law enforcement.

The availability of Fourth Amendment "pretext" claims in situations where searches and seizures are not based on probable cause–most notably, in inventory and administrative search contexts, *see Whren*, 517 U.S. at 811–provides further

evidence that a concern with discrimination does play a role in Fourth Amendment jurisprudence. Thus, inventories are only permissible if they are conducted pursuant to "standardized procedures" and if choices are guided by "standard criteria" that restrict official discretion. *See Colorado v. Bertine*, 479 U.S. 367, 375 (1987); *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983). In addition, the doctrine that governs those rare searches and seizures that are justifiable without individualized showings of suspicion evinces a distinct concern with discouraging and preventing searches and seizures based on inappropriate considerations. Random stops at sobriety checkpoints are permitted only if site selection depends on neutral guidelines and checkpoint operation is nondiscretionary. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990). And the reasonableness of random drug tests hinges, in part, on the "standardized nature of the tests" and "the minimal discretion vested in those charged with administering the [testing] program." *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989). At least in part, these doctrinal limitations reflect the view that discriminatory law enforcement is inconsistent with constitutional values.

Approval of a stop and frisk based on an allegation that an unknown, unidentified person has asserted that an individual at a particular location wearing certain clothing has an illegal weapon would generate enormous risks of discriminatory law enforcement. A showing of cause that is so minimal and that can be fabricated so easily affords officers so much discretion it literally invites arbitrary and discriminatory law enforcement.[26] While many officers would decline the

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26. A grossly disproportionate number of the lower court cases that uphold stops and frisks based on anonymous tips plus a small amount (continued...)

invitation, some undoubtedly would yield to the temptation to discriminate.[27] The negligible threshold for stops and frisks advocated by the government in this case would "permit[] 'those to discriminate who are of a mind to discriminate.'" *Batson v. Kentucky*, 479 U.S. 79, 96 (1986). This undeniable reality and its negative impacts on innocent citizens and on our nation is yet another reason for the Court to affirm the decision of the Florida Supreme Court.

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26. (...continued)
of corroboration (ordinarily more than in the present case) involve tips about "a black man." *See, e.g., United States v. DeBerry*, 76 F.3d. 884, 885 (7th Cir. 1996); *State v. Sharpless*, 715 A.2d 333, 336 (N.J. Super. Ct. App. Div. 1998). These, of course, are only the reported stops and frisks–those in cases where crime was detected. The logical inference is that a disproportionate number of innocent minority group members have also suffered the indignities of a stop and frisk.

27. One need not rely entirely on common sense to support this conclusion. In a recent, groundbreaking study of the stop and frisk practices of the New York City police, the Office of the Attorney General of New York found evidence that race has played a role. *See* Civil Rights Bureau, Office of the Attorney General of the State of New York, *The New York City Police Department's "Stop & Frisk" Practices*, iv-xi (Dec. 1, 1999). The report found that while blacks comprise 25.6% of the city's population, 50.6% of the persons stopped were black. *Id.* at 94. Whites constitute 43.4% of the city's population, but account for only 12.9% of the stops. *Id.* at 94-95. Data compiled about the practices of the New York Police Department's Street Crimes Unit (SCU)–a unit primarily concerned with removing illegal weapons from the community–furnished additional evidence of discrimination. The stop-to-arrest ratios of the SCU (the number of stops made for every arrest) were 16.3 blacks stopped per arrest, 14.5 Hispanics stopped per arrest, and 9.6 whites stopped per arrest. *Id.* at 117. According to the report, the disparities found could not be fully explained by the higher crime rates in the neighborhoods where minorities reside. *Id.* at 117-34. Race also played a role. *See id.* at 119. Diminishing the showing needed for a stop and frisk can only exacerbate an already troubling situation.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Florida should be affirmed.

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